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Supreme Court, U.S.
FILED

No. 02 251 AUG 1 2 2002

OFFICE OF THE CLERK

In The Supreme Court of the United States

MICHAEL R. CARTER,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR DEPARTMENT OF CORRECTIONS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE TRIAL COURT ERR IN GRANTING THE RESPONDENT'S MOTION TO DISMISS AS IT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY VIRGINIA CODE 8.01-654(B)(5)?

II. DID TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESS RANDALL MONGER CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WHICH COULD NOT BE JUSTIFIED BY TRIAL STRATEGY?

III. DID TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESSES MARK WHITE, LEWIS RICHARD HAWKINS AND RANDY HAWKINS CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WHICH COULD NOT BE JUSTIFIED BY TRIAL STRATEGY?

IV. DID TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE THE COMMONWEALTH'S WITNESSES WITH REGARD TO THEIR BIAS CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WHICH COULD NOT BE JUSTIFIED BY TRIAL STRATEGY?

V. DID TRIAL COUNSEL'S FAILURE TO CALL HARVEY LUTINS AS A WITNESS CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WHICH COULD NOT BE JUSTIFIED BY TRIAL STRATEGY?

VI. DID TRIAL COUNSEL'S FAILURE TO REQUEST A CONTINUANCE IN SPITE OF THE FACT THAT TEN WITNESSES WHO WERE UNDER SUBPOENA FAILED TO APPEAR CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WHICH COULD NOT BE JUSTIFIED BY TRIAL STRATEGY?

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The opinion and orders of the district court denying the Petitioners Sec. 2254 are set forth in the Appendix at A-26-33. The Court of Appeals' Order denying Petitioner's Application for a Certificate of Appealability is set forth in the Appendix at A-39-41. The Court of Appeals' Order denying Petitioner's Motion to Reconsider is set forth in the Appendix at A-46.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the petitioner's appeal was entered on March 18, 2002 and its order denying petitioner's Petition for Rehearing and Rehearing En Banc was entered on May 14, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

VIRGINIA CODE SEC. 8.01-654(B)(5)

> When and by whom writ granted; what petition to contain-

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

STATEMENT OF THE CASE

The Grand Jury for the City of Salem returned a four count indictment on February 21, 1997, charging petitioner with one count each of rape, abduction, malicious bodily injury and statutory burglary. Petitioner plead not guilty and was tried in the Circuit Court for the City of Salem before a jury on August 13-15, 1997 with the Honorable Roy B. Willett presiding.

Prior to trial, the Commonwealth moved to nolle prosequi the charge of abduction. The Court granted the motion of the Commonwealth.

At the conclusion of the evidence, the Court granted petitioner's motion to strike the charge of statutory burglary.

The jury found petitioner guilty of malicious bodily injury and not guilty of rape. Following a sentencing hearing, the jury recommended a sentence of eleven years incarceration and a $20,000 fine.

During the sentencing hearing on September 10, 1997, the trial court imposed the jury's recommended sentence of eleven years.

Petitioner appealed this conviction to the Court of Appeals of Virginia on November 10, 1998. Petitioner's appeal was denied by the Court of Appeals of Virginia on March 24, 1998. Petitioner appealed his conviction to the Supreme Court of Virginia on July 29, 1998. Petitioner's

appeal to the Supreme Court of Virginia was denied on November 3, 1998. Petitioner's demand for re-hearing before the Supreme Court of Virginia was denied on January 8, 1999.

Petitioner filed a petition for writ of habeas corpus in the Circuit Court for the City of Salem on January 7, 2000. The respondent filed a motion to dismiss the petition for writ of habeas corpus on February 8, 2000. Petitioner's petition for writ of habeas corpus was denied without a hearing by the Circuit Court of the City of Salem by order dated February 11, 2000. Petitioner filed a timely appeal to the Supreme Court of Virginia which was denied by order dated August 7, 2000.

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia on November 6, 2000. The petition was denied by order the United States District Court dated August 10, 2001.

The petitioner filed a timely notice of appeal and filed an appeal with the Fourth Circuit Court of Appeals on November 13, 2001. The petitioner's appeal was denied by order of the Fourth Circuit Court of Appeals by opinion dated March 18, 2002. On March 22, 2002, the petitioner filed a Petition for Rehearing and Petition for Rehearing En Banc in the Fourth Circuit Court of Appeals. The petitioner's Petition for Rehearing and Petition for Rehearing En Banc was denied by order dated May 14, 2002.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION TO DISMISS AS IT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY VIRGINIA CODE 8.01-654(B)(5).

The Circuit Court for the City of Salem dismissed Mr. Carter's petition for writ of habeas corpus without providing any legal or factual basis for its action. The Court's order simply states that, "...the court finds for the reasons stated in the motion to dismiss that the Petitioner is not entitled to the relief sought." The Court was required by Virginia Code Sec. 8.01-654(B)(5) to, "give findings of fact and conclusions of law following a determination on the record...." Simply adopting the argument of the Commonwealth based on two affidavits of trial counsel does not meet the requirements of Virginia Code Section 8.01-654(B)(5).

That the Court adopted the assertions of the respondent without doing a sufficiently independent review is demonstrated by its failure to recognize that at least one of the respondent's assertions was in plain error. In paragraph nine of the motion to dismiss, the respondent indicated that, "the transcript reveals that Petitioner advised the court prior to trial...that proper arrangements had been made to secure the witnesses attendance." In fact, trial counsel, not Mr. Carter, indicated to the court that arrangements had been made regarding the witnesses. Yet in spite of this significant and clear error, the trial court adopted the motion to dismiss as its own findings. This error highlights the fact that the trial court's review was insufficient and underscores the significance of the trial court's failure to comply with Virginia Code Section 8.01-654(B)(5).

The trial court's failure to meet the requirements of

Virginia Code Section 8.01-654(B)(5) prevents Mr. Carter from effectively seeking review by this Court as the trial court has failed to provide the explanation of its decision that is required by Virginia law and by the Anti-Terrorism Effective Death Penalty Act.

As a result, Mr. Carter requests that this Court enter an order requiring the Circuit Court for the City of Salem to conduct an independent review of Mr. Carter's petition and render a decision that complies with Virginia Code Section 8.01-654(B)(5).

II. TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESS RANDALL MONGER CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his counsel was ineffective for failing to interview a potential witness named Randall Monger. Mr. Carter made his counsel aware that the complaining witness, Ms. Aliff, had previously made false charges of rape against Mr. Monger that were very similar in nature to those made against Mr. Carter. Mr. Carter indicated repeatedly to his trial counsel that they needed to interview Mr. Monger and subpoena him for trial. In spite of Mr. Carter's requests, his trial counsel never contacted Mr.

Monger. Clearly, the evidence regarding the prosecutrix having made previous false claims would have been probative and admissible and would have had a strong impact on the jury.

Mr. Carter has shown under *Strickland* that he is illegally detained as a result of his counsel's failure to properly investigate his case. The failure of trial counsel to interview Mr. Monger can not be justified by any trial strategy. Had the trial counsel presented evidence of a similar past false accusation by the prosecutrix, there is a reasonable probability that the result of the proceeding would have been different.

In its motion to dismiss filed in the Circuit Court for the City of Salem, which the Court adopted, the Respondent below submitted affidavits from Mr. Carter's trial counsel. The Respondent relied on the blanket assertions of trial counsel in paragraphs four of each affidavit that they undertook an investigation of potential witnesses. Neither trial counsel stated that he even contacted Mr. Monger or that Mr. Monger was unwilling to or could not testify as Mr. Carter has indicated.

III. TRIAL COUNSEL'S FAILURE TO INTERVIEW POTENTIAL WITNESSES MARK WHITE, LEWIS RICHARD HAWKINS AND RANDY HAWKINS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his trial counsel was ineffective under the *Strickland* standard for failing to interview Mark White, Lewis Richard Hawkins, Jr. and Randy Hawkins as potential witnesses.

Mr. Carter made his counsel aware of the fact that Richard Lewis Hawkins was willing to testify that Ms. Aliff had falsely accused him of assaulting her on August 26, 1993. Mr. Carter informed his trial counsel that Ms. Aliff accused Mr. Hawkins of having assaulted her and pulling out her hair. These allegations were strikingly similar to those made by Ms. Aliff against Mr. Carter.

Mr. Carter also made his trial counsel aware of the fact that Ms. Aliff had falsely accused Mr. Randy Hawkins of assault. Ms. Aliff did not even appear in court to testify against Randy Hawkins on the charge of assault that she brought against him. This information would have undermined the credibility of Ms. Aliff in the minds of the jurors by demonstrating that she had filed false criminal charges in the past and then failed to appear to prosecute the charges.

Lastly, Mr. Carter discussed with his trial counsel the availability of a witness named Mark White. Mr. White was willing to testify about the fact that he was falsely charged by Ms. Aliff with trespassing and stalking. These charges were eventually withdrawn. Again, this evidence would have had a significant impact on the jurors as it demonstrated Ms. Aliff's willingness to file false or unjustified criminal charges.

The failure of trial counsel to interview these three witnesses can not be justified by any trial strategy. Had trial

counsel presented these witnesses, there is a reasonable probability that the outcome of the trial would have been different.

In its motion to dismiss filed in the Circuit Court of the City of Salem, which the Court adopted, the Respondent below presented affidavits of trial counsel. Both trial counsel assert in paragraphs four of each affidavit that they undertook an investigation of potential witnesses. Neither trial counsel states that he even contacted any of the three witnesses at issue.

IV. TRIAL COUNSEL'S FAILURE TO CROSS-EXAMINE THE COMMONWEALTH'S WITNESSES REGARDING MR. CARTER'S CHARACTER WITH REGARD TO THEIR BIAS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his trial counsel was ineffective for failure to cross-examine the Commonwealth's two character witnesses about their bias against Mr. Carter. On rebuttal, the Commonwealth presented the testimony of Shawn Carter and Alice Paris. Both witnesses testified that Mr. Carter had a bad reputation in the community for truth and veracity.

At the time of trial, Mrs. Shawn Carter and Mr. Carter had been involved in an adversarial custody battle over their child. Mrs. Shawn Carter had also filed assault charges against Mr. Carter. These facts show a clear bias by Ms. Shawn Carter against Mr. Carter.

Similarly, Alice Paris and Mr. Carter had been involved in a bitter custody dispute. Ms. Paris had attempted to obtain custody of their child from Mr. Carter. At the time of trial, Ms. Paris was facing child endangerment charges which had been filed by Mr. Carter. These facts show a clear bias on the part of Ms. Paris against Mr. Carter.

In spite of the fact that trial counsel was aware of the bias of these two witnesses, he made no effort to impeach their testimony on the basis of this bias.

Given that the jury had to make a credibility determination between Mr. Carter and Ms. Aliff, it was paramount that trial counsel preserve the integrity of Mr. Carter's testimony. There is no sound trial strategy which can justify counsel's failure to show that these two witnesses, who testified that Mr. Carter had a reputation in the community as a liar, had their own personal agendas against Mr. Carter and had reason to lie about his reputation.

The failure of trial counsel to effectively cross-examine these two witnesses based on their clear bias can not be justified by any trial strategy. Had trial counsel presented evidence of the bias of these two witnesses, there is a reasonable probability that the outcome of the proceeding would have been different. Impeaching a witness for any bias is fundamental in any effective cross-examination. Trial counsel can not be allowed to hide behind a claim of trial tactics when no trial strategy could justify his failure to take action and his failure to take action prejudiced Mr. Carter.

V. TRIAL COUNSEL'S FAILURE TO CALL HARVEY LUTINS AS A WITNESS CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that his trial counsel was ineffective for failure to call attorney Harvey Lutins as a witness at Mr. Carter's trial. Mr. Lutins would have testified that, in an unrelated trial, Ms. Aliff testified under oath that Mr. Carter did not rape her.

There is no evidence that could be more damning to the testimony of a prosecutrix than being confronted with her own prior sworn testimony that the crime never occurred. In spite of the potential significance of this testimony, trial counsel never called Mr. Lutins to testify and did not attempt to impeach Ms. Aliff with her prior inconsistent testimony.

The Respondents below attempted to justify trial counsel's failure to present this crucial evidence with a general claim of trial strategy. It is inconceivable that any trial attorney would fail to present this evidence in a case such as this in which credibility of the witnesses was such a critical issue.

The failure of trial counsel to call Mr. Lutins as a witness can not be justified by any trial strategy. Had trial

counsel presented evidence of past sworn testimony by the prosecutrix that the rape did not occur, there is more than a reasonable probability that the outcome of the proceeding would have been different.

VI. TRIAL COUNSEL'S FAILURE TO REQUEST A CONTINUANCE IN SPITE OF THE FACT THAT TEN WITNESSES WHO WERE UNDER SUBPOENA FAILED TO APPEAR CONSTITUTED INEFFECTIVE ASSISTANCE AND COULD NOT BE JUSTIFIED BY TRIAL STRATEGY.

In order to prove ineffective assistance of counsel under the *Strickland* standard, the petitioner must demonstrate that (1) "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment and that (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984).

Mr. Carter alleges that trial counsel was ineffective for failing to request a continuance of the trial. By letter of May 27, 1997, trial counsel requested that subpoenas be issued by the trial court compelling the presence of seventeen witnesses to testify on behalf of Mr. Carter. Ten of the witnesses who were under subpoena failed to appear at the trial of this matter.

During questioning by the trial court prior to trial, Mr. Carter indicated that his witnesses were not present at the trial. Following this statement, trial counsel assured the trial court and Mr. Carter that arrangements had been made for the witnesses to appear at a later time. Following this assertion by trial counsel, Mr. Carter indicated that he was

ready for trial. However, ten of the witnesses who were under subpoena to testify for the defense never appeared at trial and therefore could not be called as witnesses.

Article I Section 8 of the Constitution of the Commonwealth of Virginia guarantees the right of an accused to, "...call for evidence in his favor..." Prior to the trial, Mr. Carter believed that he would be able to exercise this right because he knew his counsel had subpoenaed seventeen witnesses. At the outset of the trial, Mr. Carter expressed his concern that the witnesses had not complied with their subpoenas. Trial counsel assured Mr. Carter and the court that he had arranged to have the witnesses appear to testify later during the trial. However, ten of the witnesses who had been subpoenaed never appeared in court and therefore could not be called to testify on Mr. Carter's behalf.

In its filing in the Circuit Court for the City of Salem, the Respondent argued that, "the transcript reveals that Petitioner advised the court prior to trial ...that proper arrangements had been made to secure the witness' attendance." In fact, trial counsel, not Mr. Carter, indicated to the court that arrangements had been made regarding the witnesses. Yet in spite of this clear error, the trial court adopted the motion to dismiss as its own findings. This error highlights the fact that the trial court's review was insufficient and demonstrates the danger of a trial court blindly adopting the assertion of the respondent without making a sufficient independent review of Mr. Carter's allegations.

During questioning by the Court prior to trial, Mr. Carter indicated that his witnesses were not present. Following this statement, trial counsel assured the court and Mr. Carter that arrangements had been made for the witnesses to appear at a later time. The affidavit which was filed by trial counsel two and one half years after the trial indicates that it was trial strategy not to continue the trial

when material witnesses had failed to appear. However, this affidavit clearly contradicts the colloquy among counsel, Mr. Carter and the trial court. During the colloquy, trial counsel stated that witnesses were not present pursuant to an agreement that they would appear later. This colloquy was prompted when Mr. Carter complained that his subpoenaed witnesses were not present at trial. The affidavit filed in support of the motion to dismiss established by clear and convincing evidence that trial counsel mislead the trial court and Mr. Carter about his intention to call the subpoenaed witnesses.

These allegations were sufficient to demonstrate ineffective assistance of counsel under *Strickland*. First, counsel failed to effectively represent Mr. Carter by failing to call material and relevant witnesses. Second, Mr. Carter was prejudiced by counsel's failure to call material witnesses who would have presented impeachment testimony against the prosecutrix. Since Ms. Aliff's credibility was the main issue in the case, there is a reasonable probability that the result of the proceeding would have been different if this impeachment testimony had been presented.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Honorable Court to grant his petition and issue a Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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